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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-6739.

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON.

Appellee's Motion to Dismiss.

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,
131 Tremont Street,
Boston, Massachusetts 02111.

JOHN J. BONISTALLI,
Legal Intern to the
Attorney General.

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Appellee's Motion to Dismiss.

Appellee, pursuant to Rule 16(1)(a) of the Rules of this Court, moves this Honorable Court to dismiss the appeal for failure of jurisdiction.

Opinion Below.

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

Jurisdiction.

Appellant was convicted on February 27, 1974, in the Municipal Court of the City of Boston, and notice of appeal was filed in that court on May 16, 1974. The jurisdictional statement to this Court was filed on August 16, 1974. The appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Question Presented.

Whether appellant's conviction in the Municipal Court of the City of Boston is a "final judgment" rendered by the "highest court" of Massachusetts within the meaning of 28 U.S.C. § 1257.

Statement of the Case.

On February 27, 1974, the defendant was charged in the Municipal Court of the City of Boston with the crime of unauthorized use of a motor vehicle in violation of Mass. Gen. Laws, c. 90, § 24. Appellant filed a motion for a jury trial in the Municipal Court which was denied. The Commonwealth presented its evidence and rested. The appellant, then defendant, chose to remain silent and presented no witnesses. The appellant was found guilty of unauthorized use of a motor vehicle. The appellant, on May 16, 1974, filed a notice of appeal in the Boston Municipal Court.

Argument.

In Massachusetts a defendant, properly within the jurisdiction of the Municipal Court, cannot waive a trial at the

Municipal Court level; he can, however, avoid a trial by admitting a finding of guilt and appealing; or, he can listen to the Commonwealth's evidence and rest, and then appeal, if found guilty, which is what the appellant did in the instant case.

Upon appeal, "It is reasonable to conclude that the legislature intended that . . . the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial."* *Mann* v. *Commonwealth,* Mass. Adv. Sh. (1971) 1027, 1030, 271 N.E. 2d 331, 333.

The appellant's appeal from the Municipal Court judgment "wipes out the lower court action entirely." *Mann* v. *Commonwealth,* Mass. Adv. Sh. (1971) at 1032, 271 N.E. 2d at 335. Both the finding of guilt and the sentence imposed were virtually erased by appellant Costarelli's appeal to the Massachusetts Superior Court on May 16, 1974. Thus, the finding and sentence of the Municipal Court have no force and effect for any purpose upon a judge of the Massachusetts Superior Court, much less of the United States Supreme Court, for purposes of an appeal based upon 28 U.S.C. § 1257. From the Superior Court, the appellant, pursuant to Mass. Gen. Laws, c. 278, § 28, and c. 211A, §§ 10, 11, may also have the customary appeal to the Massachusetts Appeals Court and, in some cases, review by the full bench of the Supreme Judicial Court for the Commonwealth. Therefore, the decision of the Municipal Court is not from a court of last resort; moreover,

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* See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). In Massachusetts the defendant may do this in two ways; if found guilty of certain misdemeanors in selected District Courts, he may appeal and claim a trial by jury of six at the District Court level. St. 1964, c. 656 *et seq.* He may also appeal to a twelve-man jury in the Superior Court pursuant to Mass. Gen. Laws, c. 212, § 6, and c. 278, § 18.

it is not a final judgment rendered "by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257.

The jurisdiction of this Court to review a state court judgment is confined by 28 U.S.C. § 1257 to a judgment which is final. It must be final in two senses:

> "[I]t must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 548, 551 (1945).

See *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.,* 344 U.S. 178, 180 (1952).

In the instant case, while the judgment is not subject to further review, it is eradicated by the appellant's appeal. Furthermore, the appellant was found guilty in the Municipal Court and, having exercised his right to appeal, the litigation that transpired in the Municipal Court can only be considered as an intermediate step in determining the appellant's guilt or innocence. Therefore, the decision in the Municipal Court, finding appellant guilty, cannot be considered a "final judgment" from the "highest" court available to him in Massachusetts.

The decisions cited by the appellant in his jurisdictional statement (p. 3) allegedly sustaining the jurisdiction of the Supreme Court in this matter are inapposite. The appellants in those cases had no further right of appeal and jurisdiction was sustained upon the ground that each appeal came from the highest court of the state of the case.

Conclusion.

For the reasons stated, it is respectfully suggested that the appeal be dismissed for failure of jurisdiction.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,
131 Tremont Street,
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